**Michael M. Schaefer, an Individual Proprietor *and* International Union of Operating Engineers, Local 66, A, B, C, D and R, AFL-CIO.** Case 6-CA-11026

April 22, 1982

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On October 22, 1979, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding[1] finding, *inter alia*, that Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily laying off or discharging employees Richard Bumgardner, Philip Drinkwater, Raymond Glesk, Michael Kerfonta, Jeffrey Long, and John Struniak. The Board ordered that Respondent reinstate Kerfonta and Long[2] and make whole all the discriminatees for any loss of earnings suffered by reason of the discrimination against them.

Thereafter, the Acting Regional Director for Region 6 issued and served on the parties a backpay specification and notice of hearing on June 4, 1980.[3] Respondent subsequently filed an answer on June 26, in which it denied certain allegations of the specification. On October 20 and 21, a hearing was held before Administrative Law Judge Robert Cohn for the purpose of determining the amounts of money due under the backpay specification. On August 21, 1981, Administrative Law Judge Cohn issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[4] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[5]

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Michael M. Schaefer, an Individual Proprietor, West Elizabeth, Pennsylvania, his agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] 246 NLRB 181. Chairman Van de Water and Member Hunter note that they were not on the Board at the time the initial Decision and Order issued and that their participation at this stage of the proceedings is for institutional reasons.

[2] Respondent previously had recalled the other discriminatees.

[3] All dates are in 1980 unless otherwise indicated.

[4] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[5] The Administrative Law Judge found, and we agree, that the backpay specification sets forth the proper amount of backpay owed to the discriminatees. In his recommended Order, however, the Administrative Law Judge directed that such amounts should be diminished by any payments that Respondent made to certain discriminatees as part of the purported informal settlement agreement entered into before the backpay hearing herein. We find merit in the General Counsel's limited exceptions to this recommendation since a review of the backpay specification discloses that the computations already reflect deductions of the amounts previously paid by Respondent. Accordingly, we find that the sums set forth in the backpay specification and in the Administrative Law Judge's recommended Order are correct as stated.

Chairman Van de Water joins in affirming the Administrative Law Judge in striking a portion of Respondent's answer for lack of specificity because no other matters of fact were in dispute and Respondent has had a hearing herein.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: On October 22, 1979, the National Labor Relations Board issued its Decision and Order in the above-captioned proceeding.[1] The Board ordered, *inter alia*, that Respondent make whole six named employees for any loss of earnings they may have suffered due to the discrimination practiced against them.[2] The record herein reflects that, initially, Respondent and Board representatives were unable to agree on the amount of backpay due the six discriminatees. Whereupon, on June 4, 1980, the acting Regional Director for Region 6 issued a backpay specification and notice of hearing in the matter. Having received an order extending the time for filing an answer, Respondent, on June 26, 1980, duly filed its answer to said backpay specification.

The matter was heard before me in Pittsburgh, Pennsylvania, on October 20–21, 1980, with all parties represented. As a consequence of certain admissions made by Respondent in his answer to the backpay specification, as supplemented by certain admissions made by counsel for Respondent at the hearing, the number of issues remaining to be resolved were substantially reduced. Those remaining to be considered are whether Respondent is liable for any backpay at all in view of its contention

[1] 246 NLRB 181.

[2] The named employees are Richard G. Bumgardner, Philip Drinkwater, Raymond A. Glesk, Jeffrey L. Long, Michael R. Kerfonta, and John G. Struniak.

that such sums were waived by virtue of certain conduct on the part of the Charging Party Union and/or certain of the discriminatees which Respondent contends constituted a waiver of any backpay. Respondent further contends that the formula utilized by the General Counsel for computing gross backpay was not accurate. Finally, Respondent argues that the net backpay due to discriminatee Long should not be allowed because of willful idleness on the part of Long during the backpay period.[3]

After the close of the hearing, counsel for the General Counsel and counsel for Respondent filed helpful posthearing briefs which have been duly considered. Subsequently, Respondent sought to file a reply brief. Counsel for the General Counsel moved to strike such reply brief on the grounds that such briefs are not provided for under the Board's Rules and Regulations, and therefore must be rejected by an administrative law judge. I agree with the position taken by counsel for the General Counsel, and therefore grant her motion to strike. No consideration was given to the said reply brief in the consideration of this case.

### A. *The Waiver Issue*

At the hearing, counsel for the General Counsel moved to strike paragraph 9 of Respondent's answer to the specification. In substance, the answer contended that the Charging Party waived payment of net backpay to each discriminatee in consideration for Respondent's entering into the collective-bargaining agreement which was subsequently agreed upon between Respondent and the Charging Party. Further, Respondent contended that each discriminatee except for Glesk and Struniak waived receipt of net backpay by accepting a certain sum of money in settlement of such discriminatee's claim in this case.

At the outset, counsel for the General Counsel contends that the issue of the Union's withdrawal of the charges in this case as a consequence of Respondent's offer of better wage rates and other working conditions, which allegedly constituted a waiver of the backpay due to the discriminatees herein, was raised and ruled upon by the Administrative Law Judge in the original proceeding. It does appear that the issue was raised by Respondent to the Administrative Law Judge in the original proceeding, but the Administrative Law Judge did not deem it necessary to make a finding on the issue because, as he stated:

> . . . assuming, *arguendo*, that such a commitment was made, that sort of agreement does not detract from the power of the Board to exercise its "lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Such discretion to dismiss charges will be exercised only when the unfair labor practices are substantially remedied and when, in the Board's considered judgment, such dismissal would effectuate the policies of the Act."[4]

The Board did not see fit to upset or reverse the foregoing language of the Administrative Law Judge; accordingly, I deem myself bound by the prior ruling as the law of the case.

A similar ruling is made with respect to Respondent's contention that four of the discriminatees accepted lesser sums in settlement of the claims, made on their behalf in the instant case. It is well settled that an individual may not waive, bargain away, or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle.

Accordingly, based upon the foregoing, I granted counsel for the General Counsel's motion to strike paragraph 9 of Respondent's answer to the specification, and adhere to that ruling in my Decision today.

### B. *The Backpay Formula Issue*

The specification alleges a formula for computing the gross backpay due each of the discriminatees named above. Such formula is a familiar one in which it is attempted to compute as nearly as possible the number of hours which would have been worked by each discriminatee during the backpay period based upon the average number of hours worked by each discriminatee during each week of the 6-month period preceding their discharge. Included in the average weekly adjusted hours of each discriminatee is an amount for overtime hours which was converted to its straight time equivalent and holiday pay. Respondent's answer denies the allegation "as stated," and affirmatively alleges a lesser number of hours per week which the discriminatees would have worked during the backpay period. However, Respondent's answer does not set forth any formula it utilized to arrive at such figures.

At the hearing, counsel for the General Counsel moved to strike so much of Respondent's answer which set forth the conclusionary figures which purportedly reflected the average weekly adjusted hours for each of the discriminatees during the backpay period. This motion was based upon lack of specificity required under Section 102.54 of the Board's Rules and Regulations, particularly subsections (b) and (c) of that section.[5]

[3] Respondent does not dispute the interim earnings figures on the part of the remaining discriminatees.

[4] 246 NLRB at 190.

[5] The following is the specific language of those subsections:

Section 102.54 *Answer to specification.* . . .

* * * * *

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. *As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such*

*Continued*

At the hearing, I denied the motion of the General Counsel based upon several factors which I considered important and significant in the circumstances of this case: (1) the failure of counsel for the General Counsel prior to the day of the hearing to notify counsel for Respondent of her intent to make such a motion and to clarify the issue in view of the time which had elapsed between the filing of the answer and the day of the hearing; (2) the possible unjust enrichment of the discriminatees based solely upon a technicality of pleading; and (3) the representation by counsel for Respondent at the hearing that, on the Friday preceding the hearing, there was a conference between representatives of the General Counsel and representatives of Respondent in which the positions of each party were explored and that, based upon such conference, Respondent was "ready to stipulate without any testimony, exactly what the hours are."[6]

In her brief, counsel for the General Counsel again urges the Administrative Law Judge to reconsider his ruling and to grant her motion in the light of the specific requirements set forth in Section 102.54(b) and (c). I am inclined to so reconsider my ruling at the hearing in the light of a recent decision by the Board on September 30, 1980, in *Standard Materials, Inc.*, 252 NLRB 679. In that case, as in the case at bar, the General Counsel moved to strike certain of the allegations in the respondent's answer to the backpay specification based upon the fact that the respondent only generally denied various allegations of the specification without setting forth alternative formulas or figures for any of the backpay computations. The Board granted the motion of the General Counsel in that case, stating as follows:

> The Respondent in its answer and amended answer generally denied various of the allegations of the backpay computations, including, *inter alia*, vacation pay, overtime, backpay periods, the rates of pay the discriminatees received at the time they were unlawfully discharged, the rate of pay each of them would have received during the backpay period, and the gross backpay due each discriminatee. Since this data is within the Respondent's knowledge, its failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.54(b) of the Board's Rules and Regulations. Accordingly, we strike the Respondent's answer and amended answer to those allegations of the backpay specification and, accordingly, deem such allegations to be admitted as true.[7]

Based upon all of the foregoing, I hereby reverse my ruling at the hearing respecting the allegations of paragraph 3 of the specification and strike the figures set forth by Respondent in paragraph 3 of its answer to the backpay specification. I further find the formula utilized by the Regional Director for the computation of gross backpay to be a reasonable and traditional one in cases of this kind, and therefore appropriate for the computation of gross backpay for the discriminatees in this case.

### C. *The Net Backpay Due Discriminatee Jeffrey Long*

As set forth above, Respondent at the hearing agreed with the Board's representatives respecting the interim earnings of all of the discriminatees except that of Long, who it felt did not make an adequate and reasonable search for desirable new employment during the backpay period. We come now to a consideration of the evidence bearing upon this issue.

The backpay period of discriminatee Jeffrey Long begins on December 19, 1977, when he was terminated and ends on November 17, 1979, when Long accepted Respondent's offer of reinstatement. With respect to his search for new employment, the record shows that Long immediately filed an application with the state unemployment office and continued to make weekly filings from that time until December 16, 1978. However, no employment of Long resulted from his applications with the unemployment office. He received only one referral by that office, but did not secure the job.

In addition to unemployment filings, Long also put in applications at three grocery stores during this period, but was not successful in securing employment at any of these businesses. Indeed, his only work during the first part of the backpay period was working for a friend, Sharpetta, who owned and operated a one-man business called WOW (Wash on Wheels). Long testified that he worked off loans of approximately $800 which Sharpetta had made to him.

The record reflects that Long finally secured steady employment in the third quarter of 1978 when he commenced working for two of the companies owned by William Fiore.[8] The evidence shows that he worked steadily for these companies during the latter part of 1978 and into the fourth quarter of 1979 when he was laid off. He then received and accepted an offer from Respondent and returned to work for Respondent on or about November 17, 1979.

At the hearing, Respondent sought to prove that Long had failed to secure work and/or failed to work up to his

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*matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.*

(c) Effect of failure to answer or to plead specifically and in detail to the specification.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation. [Emphasis supplied.]

[6] However, in response, counsel for the General Counsel stated that Respondent offered no information concerning a method used to calculate the hours worked by the discriminatees.

[7] 252 NLRB at 680; see also *3 States Trucking, Inc., et al.*, 252 NLRB 1088 (1980).

[8] The names of the companies are Diamond Excavating and Hauling, Inc., and Bill's Trucking, Inc.

full capability because of a "drinking problem." Long acknowledged that he had received medical attention because of a stomach ulcer, and that he did have a "drinking problem" for a period of time during the backpay period. However, he denied that such "problem" resulted in any loss of work, and I conclude that Respondent failed to establish by substantial evidence that Long failed to secure suitable alternate employment or lost time at his interim employment because of such problem.

In sum, I conclude and therefore find that Respondent in this case did not sustain its burden of proving the affirmative defense alleged; to wit, that Long willfully incurred loss of employment or neglected to make reasonable efforts to find interim work.[9] Indeed, it appears that discriminatee Long, in the instant case, made a more diligent effort to secure and retain employment than the discriminatee (Longest) in *Cornwell Company, Inc.*, 171 NLRB 342 (1968), in which the Board sustained the backpay award.[10]

Based upon all of the foregoing, I conclude and therefore find that the backpay due Long, as well as that of the remainder of the discriminatees, as set forth in the backpay specification, is true and correct.

[9] See *American Medical Insurance Company, Inc.*, 235 NLRB 1417, 1419 (1978), for a better articulated statement of the rule as set forth by the Board and the courts.

[10] See also *American Medical Insurance Company, Inc., supra.*

## ORDER[11]

Upon the basis of the foregoing findings and conclusions, it is ordered that the Respondent, Michael M. Schaefer, an Individual Proprietor, his agents, successors, and assigns, shall pay to the employees involved in this proceeding the sums set opposite their names, together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), less any tax withholdings as are required by Federal and state laws. Such amounts shall also be diminished by any moneys paid by Respondent to any of the discriminatees by way of purported settlement agreement.[12] The amount ordered to be paid the several discriminatees subject to the foregoing deductions are as follows:

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| Richard G. Bumgardner | $ 1,018.00 |
| Michael Kerfonta | 5,771.80 |
| Philip Drinkwater | 1,646.00 |
| Raymond A. Glesk | 2,040.50 |
| Jeffrey L. Long | 16,648.48 |
| John G. Struniak | 365.20 |

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] Although reference to these amounts is made in the backpay specification, it is not clear, in my view of the record, that such amounts were deducted from gross backpay in the computations. However, it is clear that the General Counsel agrees that such amounts should be deducted so that the mathematical computation made be resolved in the compliance stage of this proceeding.